Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

No. 91-1525

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

Before petitioner took over its predecessor's operations and hired virtually all of its predecessor's workforce, the National Labor Relations Board (Board) held an election in which the employees of petitioner's predecessor selected the Union as their exclusive collective-bargaining representative. Because the Board had to resolve challenges to some of the ballots cast in the election, however, the Union was not certified until after petitioner assumed its predecessor's operations.

1. Did the Board correctly rule that petitioner, as the successor to the previous employer, violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union?

2. Was petitioner entitled to litigate the successorship issue before an administrative law judge in an unfair labor practice proceeding after already litigating the issue before a hearing officer in the prior representation proceeding?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Adair Standish Corp., 290 N.L.R.B. 317 (1988)	11
Amalgamated Clothing Workers of America v. *NLRB*, 365 F.2d 898 (D.C. Cir. 1966)	13
Bundy Corp., 292 N.L.R.B. 671 (1989)	9
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	4, 7, 8, 10
Fall River Savings Bank v. *NLRB*, 649 F.2d 50 (1st Cir. 1981)	12, 16
Foothill Electric Corp., 120 N.L.R.B. 1350 (1958)	12, 14
Heights Funeral Home, Inc. v. *NLRB*, 385 F.2d 879 (5th Cir. 1967)	13
Honda of America Mfg., Inc., 259 N.L.R.B. 389 (1981)	10, 11
Howard Plating Indus., 230 N.L.R.B. 178 (1977)	9
International Ladies' Garment Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276 (1975)	16
Laney & Duke Storage Warehouse Co., 151 N.L.R.B. 248 (1965), enforced, 369 F.2d 859 (5th Cir. 1966)	11
Lawrence Typographical Union v. *McCulloch*, 349 F.2d 704 (D.C. Cir. 1965)	14
Magnesium Casting Co. v. *NLRB*, 401 U.S. 137 (1971)	12, 16
Mike O'Connor Chevrolet-Buick-GMC Co., 209 N.L.R.B. 701 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975)	9
NLRB v. *Allied Products Corp.*, 548 F.2d 644 (6th Cir. 1977)	9

Cases—Continued: Page

NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) 4, 7
NLRB v. *Dillon Stores*, 643 F.2d 687 (10th Cir. 1981) 13-14
Pittsburgh Plate Glass Co. v. *NLRB*, 313 U.S. 146 (1941) 12
Retail Clerks Union, Local 1401 v. *NLRB*, 463 F.2d 316 (D.C. Cir. 1972) 12, 16
Riverside Press, Inc. v. *NLRB*, 415 F.2d 281 (5th Cir. 1969), cert. denied, 397 U.S. 912 (1970) 14
Rock Hill Telephone Co. v. *NLRB*, 605 F.2d 139 (4th Cir. 1979) 14
Sahara Datsun, Inc. v. *NLRB*, 811 F.2d 1317 (9th Cir. 1987) 13
Serv-U-Stores, 234 N.L.R.B. 1143 (1978) 13
Sundstrand Heat Transfer, Inc. v. *NLRB*, 538 F.2d 1257 (7th Cir. 1976) 9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 17
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 15, 16

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(11), 29 U.S.C. 152(11) 5
§ 8(a)(1), 29 U.S.C. 158(a)(1) 6
§ 8(a)(5), 29 U.S.C. 158(a)(5) 6, 11, 12, 14
§ 10(e), 29 U.S.C. 160(e) 15, 16

Miscellaneous:

Casehandling Manual 15

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A12, is unpublished, but the judgment is noted at 951 F.2d 350 (Table). The decision and certification of representative issued by the National Labor Relations Board (Board) in the underlying representation proceeding, Pet. App. A13-A15, is unreported. The Board's decision and order in the unfair labor practice proceeding, Pet. App. A16-A24, is reported at 299 N.L.R.B. No. 50.

JURISDICTION

The decision and judgment of the court of appeals was filed on December 20, 1991. The petition for a writ of certiorari was filed on March 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to March 1, 1989, Greenbriar Care Center (Greenbriar) operated a nursing care facility at premises leased from Health and Rehabilitation Properties Trust (HRPT). On December 15, 1988, the American Federation of State, County, and Municipal Employees, AFL-CIO (Union) filed a petition with the Board seeking certification as the collective bargaining representative of a bargaining unit which included various classes of Greenbriar employees. In early January 1989, Greenbriar and the Union stipulated to a consent election; and on February 17, 1989, the Board conducted the election. Pet. App. A3, A25-A26. In that election, 41 employees voted in favor of the Union, 37 voted against it, and ten ballots challenged by the Union were not counted. Pet. App. A26-A27. Because the ten challenged and uncounted ballots could determine the election's outcome, the Board was required to resolve the challenges.

Sometime before the election, however, Greenbriar failed to meet its lease obligations to HRPT. As a result, in late January 1989, an official of HRPT contacted petitioner, New Medico Health Care Center of Michigan, Inc., to inquire whether it was interested in operating the Greenbriar facility. Pet. App. A3. On February 17, 1989—the day of the election—petitioner agreed to lease the facility for a three-year term beginning March 1, 1989. Ten days after the election, on February 27, 1989, petitioner sent letters

to Greenbriar employees notifying them that it was going to assume Greenbriar's lease. The letter encouraged Greenbriar employees to apply for positions with petitioner and informed them that petitioner would consider years of service with Greenbriar in establishing wages, which were to be higher than Greenbriar's. Petitioner also noted in its letter that those it hired would receive credit for seniority accumulated at Greenbriar. Pet. App. A3. In addition, petitioner referred to the February 17 election, stating that it would prefer not to deal with a union but, if one were certified, petitioner would bargain in good faith. *Id.* at A38-A39 n.17.

On March 1, 1989, petitioner began operating the former Greenbriar facility.[1] However, it denied that it was a successor to Greenbriar and, consequently, disputed whether it succeeded to any of Greenbriar's obligations to the Union. Accordingly, the Board's Regional Director ordered a Hearing Officer to take testimony and resolve factual disputes concerning two questions: (1) whether the challenged ballots should count in the election; and (2) whether petitioner was Greenbriar's successor and therefore succeeded to any bargaining obligation imposed on Greenbriar as a result of the election. Pet. App. A28-A29.

2. After taking testimony, the Hearing Officer recommended that the Board certify the Union as the bargaining representative of the various classes of petitioner's employees. On the successorship issue, the Hearing Officer found that "a substantial continuity of the employing enterprise," within the mean-

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[1] Petitioner learned of the election prior to the March 1 closing date and could have cancelled its agreement but, because of its past relationship with HRPT, did not. Pet. App. A38.

ing of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), existed between petitioner and Greenbriar. Pet. App. A35-A36. Rejecting petitioner's argument that its planned upgrade of the facility and creation of a traumatic head injury rehabilitation unit would change the nature of the enterprise, the Hearing Officer found that petitioner

> operates a nursing care center as did its predecessor, Greenbriar. It commenced operation without hiatus in the same facility, utilizing a virtually identical workforce, holding the same or similar jobs, under the same or similar working conditions, working under the same supervisors and with the same non-unit employees, caring for the same patients, with at least some of the same equipment. Unit employees worked one day for Greenbriar, the next for [petitioner]. Job applications and W-4 forms for [petitioner] were not filled out until several days after the takeover. Time worked for Greenbriar was credited as time worked for [petitioner] for certain wage and benefit purposes. It is difficult to imagine a greater degree of continuity.

Id. at A36-A37. Applying the Board's "substantial and representative complement" test—endorsed by this Court in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 28 (1987)—the Hearing Officert further found that petitioner had hired a substantial and representative complement of employees as of March 1, 1989, the day it commenced operating the former Greenbriar facility. Pet. App. A38.

Petitioner contended before the Hearing Officer, as it does in its petition, that it had no obligation to bargain with the Union because the Union had not been recognized by Greenbriar or certified by the Board prior to March 1, 1989, the date it took over

the facility. The Hearing Officer rejected that argument, reasoning that, had the "challenged ballots not been determinative, and had [the Union] received a majority of the ballots cast, [petitioner], as a successor, would have been obligated on March 1[, 1989,] to bargain with [the Union]. It would * * * go contrary to the purposes and policies of the Act, to find that[,] because of determinative challenges [to certain ballots,] no obligation exists [even though it turns out that the Union] receive[d] a majority of the votes." *Id.* at A42.

The Hearing Officer then turned to the challenged ballots. He found that, after all challenges were resolved, the Union had maintained an election victory.[2] Accordingly, the Hearing Officer recommended that the Board find petitioner a successor to Greenbriar and certify the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. Pet. App. A69.

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[2] Prior to the hearing, the parties agreed that five of the ten challenged ballots should be opened and counted. The corrected tally of ballots showed 43 votes for and 40 votes against the Union. The remaining five ballots were challenged by the Union on the ground that the individuals were supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11). Pet. App. A27-A28. During the hearing, petitioner, Greenbriar, and the Union stipulated that two of the remaining five ballots be opened and counted and two remain sealed and uncounted, leaving only one ballot in dispute. *Id.* at A43. That ballot was cast by Susan Griffin, whom the Hearing Officer ultimately found to be a supervisor; he therefore recommended that the challenge be sustained. *Id.* at A68. Since the two ballots which petitioner and the Union had stipulated should be opened and counted were no longer determinative (as the Union held a 3-vote lead), the Hearing Officer recommended that they not be opened. *Id.* at A69.

3. On March 1, 1990, the Board issued a decision adopting the Hearing Officer's findings and recommendations and certified the Union. Pet. App. A13-A15.[3] When petitioner refused to bargain, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain with the Union. Pet. App. A16-A24.

4. The court of appeals enforced the Board's order in an unpublished per curiam opinion. Pet. App. A1-A12. The court held that substantial evidence supported the Board's finding of "substantial continuity" betwen the enterprises operated by Greenbriar and petitioner. *Id.* at A7. It also rejected petitioner's contention that the successorship determination should have been made as of the date the Board certified the Union and not the date petitioner began operating the former Greenbriar facility. Finding "no cases that address the situation at bar," *id.* at A8, the court followed the Board's reasoning. It explained:

> Clearly, the successorship issue would have been determined as of March 1, 1989, had the challenged votes not been determinative. We can think of no reason why the result should be dif-

[3] The Board's decision named Greenbriar as the employer in its description of the appropriate bargaining unit. Pet. App. A14. The Board subsequently corrected this inadvertent error. *Id.* at A76-A77; *id.* at A19 n.4.

> ferent because it took more than a year to resolve the election. Any other position only encourages new owners to circumvent [their] obligations by filing challenges to certification. By the time these challenges are resolved, the bargaining unit may no longer represent "a substantial and representative complement" of employees.

Id. at A8.

The court also rejected petitioner's claim that it was entitled to litigate the successorship issue before an administrative law judge. Pet. App. A8-A9. The court explained that petitioner's liability in the unfair labor practice proceeding turned on its successorship status, an issue that was appropriately and previously resolved in the representation proceeding. *Id.* at A9.[4]

ARGUMENT

In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), this Court concluded that imposing a bargaining obligation on a new employer is appropriate when the new employer maintains substantial continuity in the operation of its predecessor's business so that "the bargaining unit remains unchanged" and "a majority of [the successor's] employees * * * were employed by the preceding employer." *Id.* at 279, 281. In *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), this Court reiterated that, "[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of [Section] 8(a)(5) is activiated." *Id.* at 41. The

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[4] The court also upheld the Board's finding that Griffin was a supervisor. Pet. App. A9-A12. Petitioner does not seek further review of this finding.

Court went on to state that *Burns* had approved "the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old," and that this approach "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Id.* at 43. In this case, the Board, upheld by the court of appeals, found that petitioner substantially continued the operations of Greenbriar and hired a majority of its workforce. Accordingly, it held that petitioner succeeded to Greenbriar's bargaining obligations. Because that determination is both correct and consistent with the decisions of this Court, the courts of appeals, and Board precedent, further review is unwarranted.

1. Petitioner contends that because there was no certified or recognized bargaining relationship between the Union and Greenbriar on March 1, 1989, the day petitioner began operating the facility, *Burns* and *Fall River* are not applicable here. Pet. 14-18, 21. It is true, as petitioner notes, Pet. 14-18, that the union in *Burns* had been certified before—just before—the new employer assumed its predecessor's operations. But in *Fall River*, the Court made clear that *Burns* was "not limited to a situation where the union in question has been recently certified." 482 U.S. at 41. Rather, it applies "even if [the] union * * * has not been certified just before the transition in employers," as long as there is a presumption that the Union is or remains the employees' bargaining representative. *Id.* at 37, 41.

Here, there was such a presumption. Under consistent Board precedent, an employer's obligation to bargain is established as of the date of an election in which a majority of the bargaining-unit employees

vote for union representation, regardless of when the union receives Board certification. See *Howard Plating Indūs.*, 230 N.L.R.B. 178, 179 (1977). Thus, the Board has long held that:

> [A]bsent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. * * * Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued.

Mike O'Connor Chevrolet-Buick-GMC Co., 209 N.L.R.B. 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975) (footnote omitted). Regardless of the pendency of such objections, as of the date of the election, "the [u]nion [becomes] the statutory collective-bargaining representative of the employees * * *. From that moment forward it [is] entitled to notice and an opportunity to bargain collectively over [any changes in terms and conditions of employment] that might be effectuated thereafter." *Bundy Corp.*, 292 N.L.R.B. 671, 677 (1989). An employer is obligated to give the union notice and the opportunity to bargain because of the "presumptive status of the [u]nion as collective bargaining representative during the interim." *Sundstrand Heat Transfer, Inc.* v. *NLRB*, 538 F.2d 1257, 1259 (7th Cir. 1976). Accord *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977). As a result, Greenbriar's bargaining obligation commenced on February 17, 1989, when a majority of its employees voted for union representation; peti-

tioner succeeded to that obligation when it became Greenbriar's successor on March 1, 1989.

2. Petitioner also contends, Pet. 21-23, that its successorship status should have been determined as of March 7, 1990, the date the Union made a bargaining demand on it, rather than as of March 1, 1989, the date on which petitioner assumed Greenbriar's operations.[5] Ordinarily, "[t]he successor's duty to bargain * * * is triggered only when the union has made a bargaining demand." *Fall River*, 482 U.S. at 52. But an employer's decision to contest the union's certification at a Board representation proceeding is, in effect, a rejection of a bargaining demand. See *Honda of America Mfg., Inc.*, 259 N.L.R.B. 389, 390 & n.3 (1981). In such circumstances, there is no need for the union to make a "demand" for recognition: The employer is already aware that the union seeks to maintain its representative status by reason of the union's continuation of proceedings before the Board; and the employer's decision to contest the union's certification, in turn, provides the union with notice that the employer will not bargain with it until its status is resolved. Settled Board law has long so held, *Honda of America Mfg., Inc., supra*, and petitioner offers no compelling reason why the law should be otherwise.[6]

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[5] According to petitioner's projections at the hearing, the predecessor's workforce might be only a minority of its workforce by March 1990; in addition, by then its operations may have changed sufficiently to preclude a substantial continuity finding.

[6] The Board has similarly held that, whether or not the union has requested bargaining, an employer commits an unfair labor practice by making unilateral changes in terms and conditions of employment during the pendency of election objections if the union is later certified. See *Laney & Duke*

By litigating the successorship issue and the challenged ballots, petitioner here sent the Union a clear signal that, pending final resolution of those matters, it would not honor a request for recognition or bargaining. Similarly, by continuing its bid for recognition, the Union made it obvious that it sought to retain its representative status. Because those actions were the equivalent of a demand for bargaining and rejection of that demand, the appropriate date for assessing petitioner's successorship was the date petitioner took over Greenbriar's operations, March 1, 1989. See *Honda of America Mfg., Inc., supra.* The Board and the court of appeals were correct to so hold.

3. Petitioner's final contention—that an Administrative Law Judge, rather than a Hearing Officer, should have resolved the successorship issue, Pet. 24-28—is both meritless and jurisdictionally barred.

In general, an employer cannot obtain direct court review of a Board decision certifying a union as the bargaining representative of its employees. If the employer believes that the Board's decision in the representation proceeding is erroneous and the union's resulting certification invalid, it must test the decision by refusing to bargain with the union. That refusal, in turn, will draw an unfair labor practice charge from the union which may form the basis of a complaint by the Board's General Counsel. If the Board finds that the refusal to bargain violates Section 8(a)(5) and orders the employer to bargain, *then* the employer may obtain court review of *both* the order in the unfair labor practice proceeding and

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Storage Warehouse Co., 151 N.L.R.B. 248, 266-267 (1965), enforced in relevant part, 369 F.2d 859 (5th Cir. 1966). See also *Adair Standish Corp.*, 290 N.L.R.B. 317, 329 (1988).

the decision to certify the union in the underlying representation proceeding. In such circumstances, the unfair labor practice proceeding under Section 8(a)(5) and the prior representation proceeding "are really one." *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 158 (1941). As a result, issues which were or could have been litigated in the representation proceeding cannot be litigated in the unfair labor practice proceeding. See *id.* at 161-162. Accord *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141 (1971); *Fall River Savings Bank* v. *NLRB*, 649 F.2d 50, 58-59 (1st Cir. 1981); *Retail Clerks Union, Local 1401* v. *NLRB*, 463 F.2d 316, 322-325 (D.C. Cir. 1972). This makes sense: Where the employer has already had the opportunity to litigate an issue in the representation proceeding, there is no reason to permit relitigation of the issue in the subsequent unfair labor practice proceeding.

Here, petitioner litigated the successorship issue in the representation proceeding and put its arguments concerning the finding of successorship before the Board in its exceptions to the Hearing Officer's findings and recommendations. It lost. It then sought to put those same arguments before an Administrative Law Judge and the Board in the unfair labor practice proceeding. Because petitioner's arguments had already been rejected once, there was no reason for further proceedings and the Board granted summary judgment against petitioner. Petitioner's only recourse was to the courts; it had no right to relitigate the issues before the Board.

Petitioner does not disagree with "the general principle that, where representation case findings are 'related' to subsequent unfair labor practice proceedings, such findings may not be relitigated in an unfair labor practice hearing [before an adminis-

trative law judge]." Pet. 24. However, it asserts that the principle is inapplicable here. Petitioner is mistaken. In *Amalgamated Clothing Workers of America* v. *NLRB*, 365 F.2d 898, 902-905 (1966), the Court of Appeals for the District of Columbia Circuit explained that findings made in a representation proceeding may not be relitigated in a "related" unfair labor practice proceeding if the employer's defense to the unfair labor practice charge is simply a challenge to the result of the representation proceeding. In other words, where the employer defends against the unfair labor practice charge by disputing the validity of the union's certification, the Board will not hear the employer's challenge. However, where the defense to the unfair labor practice charge is independent of the validity of the union's certification, the issue may be litigated in the unfair labor practice proceeding.[7] The Board adopted the Court of Appeals for the District of Columbia Circuit's interpretation in *Serv-U-Stores*, 234 N.L.R.B. 1143 (1978), and the courts of appeals have agreed with it consistently ever since. See, *e.g.*, *Sahara Datsun, Inc.* v. *NLRB*, 811 F.2d 1317, 1321 (9th Cir. 1987); *NLRB* v. *Dillon Stores*, 643 F.2d 687, 690 (10th

[7] For example, where the issue of an individual's supervisory status pertains to whether he or she was properly included in the unit for purposes of determining whether the union won an election, the issue cannot be relitigated. However, the issue of supervisory status may be relitigated where it is relevant to a determination of whether an employer unlawfully discharged an individual for engaging in protected activity, *e.g.*, *Heights Funeral Home, Inc.* v. *NLRB*, 385 F.2d 879 (5th Cir. 1967), or whether an alleged supervisor unlawfully interfered with employees' protected activities, *e.g.*, *Amalgamated Clothing Workers* v. *NLRB*, 365 F.2d 898, 902, 905 (D.C. Cir. 1966).

Cir. 1981); *Rock Hill Telephone Co.* v. *NLRB*, 605 F.2d 139, 143 (4th Cir. 1979); *Riverside Press, Inc.* v. *NLRB*, 415 F.2d 281, 284-285 (5th Cir. 1969), cert. denied, 397 U.S. 912 (1970).[8]

In this case, neither the unfair labor practice charge nor petitioner's defense to it was independent of the Union's certification; instead, petitioner defended against the charge by challenging the certification decision made in the representation proceeding. Petitioner concedes as much, admitting that it refused to bargain with the Union because "it believed the [Union's] certification by the Board to be in error." Pet. 11. Even the theory petitioner asserted —that certification of the Union as the bargaining representative of its employees was improper because petitioner did not succeed to Greenbriar's bargaining obligation—was the same theory petitioner advanced in the representation proceeding. As the court of appeals correctly noted, Pet. App. A9, petitioner's "liability for [Section 8(a)(5)] violations depend[ed] on whether the election yield[ed] Certification." Because petitioner had already litigated the successor-

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[8] In *Foothill Electric Corp.*, 120 N.L.R.B. 1350 (1958), Pet. 28, the Board allowed the union to litigate the validity of a contractual union-security clause in a representation proceeding because it was material to the union's claim that it was properly elected as the employees' bargaining representative —*i.e.*, to whether the Board's contract bar rules precluded the holding of an election at that time. In *Lawrence Typographical Union* v. *McCulloch*, 349 F.2d 704 (D.C. Cir. 1965), Pet. 28, the court held that a district court had no jurisdiction to enjoin a decertification petition on an allegation that the Board had improperly refused to admit evidence pertaining to a related unfair labor practice complaint in the decertification proceeding. Neither case supports petitioner's contention that the Board was precluded from determining the successorship issue here in the representation proceeding.

ship issue in the representation proceeding, the Board's refusal to permit its relitigation in the unfair labor practice proceeding was undeniably correct.[9]

In any event, review of this issue is jurisdictionally barred. Under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts lack jurisdiction to consider any issue not urged before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers'*

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[9] Petitioner's argument that the Board violated the procedures in its Casehandling Manual, Pet. 26-28, is simply wrong. Section 11420.1 of the Manual, on which petitioner relies, Pet. 26-27, applies to *independent* unfair labor practice claims which are pending during the representation proceeding. As explained above, the unfair labor practice claim here and petitioner's defense to it were *not* independent of the representation proceeding; instead, petitioner defended against the unfair labor practice charge by challenging the result of the representation proceeding, the Union's certification. In any event, nothing contrary to the Manual, even as misconstrued by petitioner, happened here. Contrary to petitioner's assertion, Pet. 28, the Hearing Officer never "found" that petitioner participated in an unfair labor practice. See Pet. App. A25-A70. Nor did he recommend that the Board do so. *Id.* at A68-A69. In fact, no unfair labor practice determination was made until five months *after* the Board had adopted the Hearing Officer's findings and recommendations on the representation issue. See Pet. App. A13-A15 (Decision dated March 1, 1990, adopting the Hearing Officer's findings and recommendations and certifying the Union); Pet. App. A16-A24 (Decision and Order, dated August 9, 1990, finding that petitioner committed an unfair labor practice by refusing to bargain with the employees' duly certified representative). And then, the unfair labor practice decision was made by the Board on a motion for summary judgment, not by a Hearing Officer. That was the appropriate procedure, as no facts were in dispute: The Board had already held the Union properly certified in a prior proceeding, and petitioner had conceded that it had refused to negotiate with the Union.

Union v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).[10] Petitioner could have objected to having the Hearing Officer resolve the successorship issue when petitioner filed its exceptions to the Hearing Officer's findings and recommendation with the Board. See p. 12, *supra*. It did not. Consequently, petitioner was also barred from raising the issue in the unfair labor practice proceeding. See *Magnesium Casting Co.*, 401 U.S. at 141; *Fall River Savings Bank*, 649 F.2d at 58-59; *Retail Clerks Union, Local 1401*, 463 F.2d at 322-325. Because petitioner failed to timely bring before the Board its objection to having a Hearing Officer resolve the successorship issue, the courts lack jurisdiction to hear it. *Woelke & Romero Framing, Inc., supra; International Ladies' Garment Workers' Union, supra.*[11]

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[10] Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner offers no excuse for its failure to timely raise the issue before the Board, no less the "extraordinary circumstances" required by the statute. Although the Board raised Section 10(e) below, see Board C.A. Br. 19 n.6, the court of appeals never addressed the 10(e) issue, addressing the merits instead.

[11] While not stated in its questions presented for review, petitioner asserts that, in fact, it is not a successor to Greenbriar because "there was not a substantial continuity of the same operations." Pet. 19. Petitioner refers to its plan to "radically redesign[], remodel[], and reconstruct[]" the Greenbiar facility, *ibid.*, and to hire additional workers into new job classifications, Pet. 20. The Board, however, found, and the court of appeals agreed, that petitioner's changes, both implemented and projected, "are not so substantial so as to change the nature of the enterprise." Pet. App. A9, A40. To the extent that petitioner may be understood to chal-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

MAY 1992

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lenge this finding, the issue is fact-bound and does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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